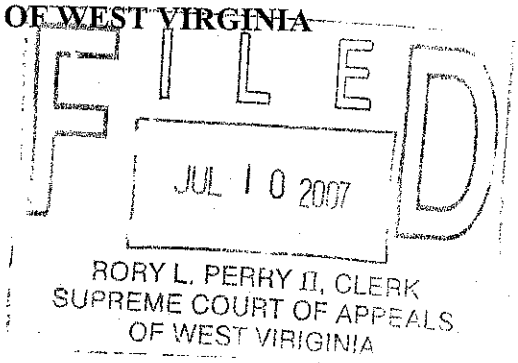
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33440



Arthur C. Boggs,

Appellee

vs.

Board of Review, West Virginia Division of Employment Security, James C. Dillon, Chair; Quetta Muzzle, Commissioner of the Department of Employment Security, Arthur C. Boggs; and Gary W. Childress,

Respondents.

Clearon Corp.,

Appellant

REPLY BRIEF OF APPELLEE, ARTHUR C. BOGGS

Counsel for Appellee Boggs
Bradley J. Pyles
W. Va. State Bar No. 2998
Pyles, Haviland, Turner & Mick
P.O. Box 596
Logan, WV 25601
(304) 752-6000

Counsel for Appellant
Christopher L. Slaughter
W. Va. State Bar No. 6958
Robert L. Bailey
W. Va. State Bar No. 8902
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
P.O Box 1588
Charleston, WV 25326-1588
(304) 522-8290-(304)-353-8000

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I. INTRODUCTION

This is an appeal from a decision of the Circuit Court of Kanawha County which reversed a decision of the West Virginia Bureau of Employment Programs, Board of Review, hereinafter the BOR, and awarded unemployment benefits to Respondents Arthur C. Boggs and Gary W. Childress, hereinafter the claimants. Relying on a written policy of the Division of Unemployment Compensation, the Court found that the Clearon Corp., hereinafter the employer, was the moving party in the termination of the claimants and that the claimants were entitled to unemployment benefits.

This Court has previously heard and denied a Petition for Appeal involving the same issue in Verizon Services Corp. v. Barbara Baldwin, et al., Case No. 050599. The claimants respectfully request that this petition also be denied and the decision of the Circuit Court upheld.

II. STATEMENT OF FACTS

The relevant facts in this case are not in dispute. The claimants were employed by the employer or its predecessors for a number of years. Based on several factors, the primary of which was foreign competition, the employer made a decision to reduce its operating costs in several ways. One of the ways the employer determined to reduce its costs was to reduce the number of employees. See Employer Exhibit, BOR Transcript 2 (All transcript references will be to the BOR Transcript.) Actually, the claimants were told that employment at the local facility would be reduced by 20 to 25 employees. Tr p. 50.

A review of Employer Exhibit 2 plainly illustrates the financial problems facing the employer and its necessity to reduce the number of employees. Material costs had increased, sales had decreased, Chinese imports were up and market share in Europe was lost to Chinese

competition. The employer lost money in 2001 and 2002 and was projected to lose money in 2003.

In addition at its October, 2003 employee meetings, the employer announced a number of changes that would be made in regard to benefits and working conditions. For example, in the maintenance department, the employer was going to out source a substantial amount of work. Unlike previous years, vacations would not be permitted during the fall outage. The employer match for the 401-k plan was suspended. No bank days for 2004 were going to be made. Holiday carryover was eliminated. The employer disability policy was adversely changed and changes were instituted in workers compensation. All of the changes were made unilaterally and without any discussion with employees.

In order to reduce the headcount, the employer put into place an early retirement income plan. The plan permitted lump-sum payments to employees and the early retirement reduction penalty was waived. After considering the matter, the claimants decided to accept the early retirement offer. Based on the above facts, the unemployment compensation division properly awarded benefits. On appeal, an administrative law judge reversed and an overpayment was declared. The BOR affirmed the ALJ decision and the Circuit Court reversed and reinstated the initial decision.

On April 10, 2001, the Bureau of Employment Programs, through Daniel Light, its then Director of Unemployment Compensation, adopted a policy in regard to employer-initiated voluntary separations. That policy, promulgated as Local Office Letter 2200, was specifically designed to deal, from an unemployment compensation benefit standpoint, with the increasing tendency by employers to accomplish reductions in force through "voluntary separations." The

essence of Local Letter 2200 is that once an employer decides to reduce its workforce, employees who are offered an incentive to leave voluntarily are not disqualified from receiving benefits. Rather, under those circumstances, they will be considered to have left work voluntarily with good cause involving fault on the part of the employer. The elements necessary to invoke Local Office Letter 2200 are: (1) an employer-initiated plan to downsize; (2) the establishment of the voluntary election plan; and (3) the election by an employee to accept that plan.

III. ISSUE

The issue in this case is whether claimants who are offered an early retirement package in the context of announced layoffs and unilateral changes in working conditions are entitled to unemployment benefits based on a written policy promulgated by the agency that is charged with administering the unemployment statutes. In addition, should the claimants be disqualified for benefits where the employer unilaterally makes substantial changes in benefits.

IV. ARGUMENT

A. STANDARD OF REVIEW

Claimants agree that this case involves a legal issue. The facts are undisputed. Under these circumstances, the Court's review is de novo.

B. LOCAL OFFICE LETTER 2200

The crux of this case is Local Office Letter 2200. The claimants contend that the policy stated in that promulgation is not contrary to the statute and entitles them to unemployment benefits. Typically, local office letters involve the agency's interpretation of the statute and represents the policy of the agency. It was that policy which lead to the award of benefits by the deputy in the local office.

As a matter of law, the interpretations that agencies make of the statutes they administer are entitled to deference. In Lincoln County Board of Education v. Adkins, 188 W.Va. 430, 424 S.E.2d 775 (1992), this Court stated in Syllabus Point 7 that "...interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Later, in Martin v. Randolph County Board of Education, 195 W.Va. 297, 465 S.E.2d 399 (1995), the Court noted that "...it is by now common place that when faced with a problem of statutory construction, the circuit court and this court should give some deference to the interpretation of the officer who is charged with statutory implementation." Martin at p.415. More recently, the Court reiterated this principle in State ex rel ACF Industries, Inc. V. Vieweg, 204 W.Va. 525, 514 S.E.2d 176 (1999). In Syllabus Point 4, the Court stated as follows:

> "Interpretations as to the meaning and application of workers' compensation statutes by the Workers' Compensation Commissioner as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this state, pursuant to West Virginia Code 23-1-1 (1997) (repl vol 1998), should be accorded deference if such interpretations are consistent with the legislation's plain meaning and ordinary construction."

In that case, the Commissioner of Workers' Compensation interpreted the 1995 amendments to the workers' compensation statute in such a fashion that the amendments did not apply to claims which had arisen prior to the effective date of the statute. The employer in that case had vigorously argued that the legislation intended the statute to operate retroactively. In deciding the case, the Court placed great reliance on the policy of the agency inasmuch as that policy did not conflict with the statute.

Claimants contend that Local Office Letter 2200 is not contrary to Code Section 21A-6-3(1). The phrase "voluntarily without good cause on the part of the employer" is a term of art and

is not defined in the statute. Indeed over the years this Court has often dealt with what it means. See Wolford v. Gatson, 182 W.Va. 674, 391 S.E.2d 364 (1990); Murray v. Rutledge, 174 W.Va. 423, 327 S.E.2d 403 (1985); Lough v. Cole, 172 W.Va. 730, 310 S.E.2d 491 (1983): Gibson v. Rutledge, 171 S.E.2d 164, 298 S.E.2d 137 (1982); Ross v. Rutledge, 175 W.Va. 701, 338 S.E.2d 178 (1985); McDonald v. Rutledge, 174 W.Va. 649, 328 S.E.2d 524 (1985).

The cited cases illustrate that the phrase is extremely ambiguous. Local Office Letter simply states when a claimant will or will not be disqualified where there is a separation involving employer-initiated separation plans. Increasingly, these type of separation plans are being used by employers as a vehicle for work force reduction. It is therefore appropriate for the Bureau of Employment Programs to promulgate a policy that guides local offices in deciding these cases. Based on ACF Industries, supra, Martin, supra, and Adkins, supra, the agency's policy is entitled to substantial deference.

The record reflects all the elements for the award of benefits are present in this case. Plainly, the employer had determined to reduce its workforce and had a plan in place to do so. The employer made a decision to offer employees an enhanced retirement package and the claimants opted to accept it. Under the Local Office Letter 2200, the employer was the moving party in the separation and the claimants are therefore entitled to benefits.

C. THE EMPLOYER MADE SUBSTANTIAL UNILATERAL CHANGES

It is well established that where an employer makes substantial, unilateral changes in the terms and conditions of employment, an employee who leaves employment as a result of such changes is entitled to unemployment benefits. Murray v. Rutledge, supra and Wolford v. Gatson, supra. The evidence in this case supports a finding that the employer did, in fact, substantially and

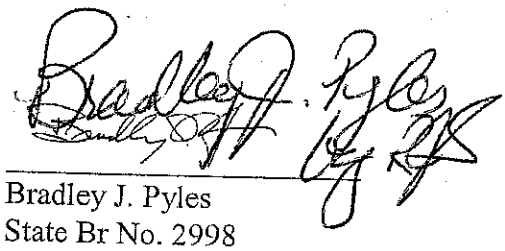
unilaterally change the terms and conditions of employment for the claimants.

The employer's contribution to the 401-k plan was eliminated. The disability insurance plan was changed to the detriment of the claimants. Vacation was altered. Subcontracting was increased. These changes may well have been economically necessary. However, they were obviously substantial and unilateral. Accordingly, the claimants are not disqualified from receiving benefits.

CONCLUSION

Based on the above and on the entire record, the decision of the Circuit Court was correct and the Petition for Appeal should therefore be denied.

ARTHUR C. BOGGS, Respondent
By Counsel



Bradley J. Pyles
State Br No. 2998
Pyles, Haviland, Turner & Mick
P.O. Box 596
Logan, WV 25601
(304) 752-6000

CERTIFICATE OF SERV ICE

I, Bradley J. Pyles, counsel for Respondent do hereby certify that service of the foregoing Respondent's Reply Brief was served upon the following counsel by depositing the same in the United States first class mail, postage prepaid, this the 10th day of July, 2007, as follows:

Christopher L. Slaughter
Robert L. Bailey
Steptoe & Johnson
P.O. Box 1588
Charleston, WV 25326-1588

Mike Jones, Chairman
Board of Review
Bureau of Employment Programs
112 California Avenue
Charleston, WV 25305

The Honorable Paul Zakaib, Jr.
Kanawha County Circuit Court Judge
111 Court Street
Charleston, WV 25301

Bradley J. Pyles By
Counsel for Respondent